third party. Similarly, if the second defendants having paid the plaintiffs were to sue Ko for the recovery of the sum so paid or sue the first defendants for a rateable contribution of the said sum, the proviso is equally important. And if it is held that Ko was not covered by the second defendants' policy, he is entitled to turn to the first defendants, who under their policy covered him whilst even driving a motorcar belonging to another person. But all these issues are issues which are relevant only as between the insurers and the insured and authorized drivers. They are not relevant in a suit between the injured third parties and the insurers. In such a suit the expression in section 80(1) of the Ordinance saying "notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy" renders such issues irrelevant.

The plaintiffs' right to the satisfaction of the judgment by the second defendant is not absolute as it is expressly stated in section 80(1) of the Ordinance to be "subject to the provisions of this section". One of the provisions relied upon by the second defendants in their statement of defence is subsection (2)(a). Under this subsection the second defendants would not be liable to pay the judgment sum "unless before or within seven days after the commencement of the proceedings in which the judgment was given *the insurer (i.e. second defendants) had notice of the proceedings.*" (The bracketed words and emphasis are ours). The second defendants said in the statement of defence that they were under no statutory duty to satisfy the said judgment, "as the plaintffs had failed to give to the second defendants notice of commencement of proceedings in Civil Suit No. 82 of 1975 as required under section 80(2)(a) of the Road Traffic Ordinance, 1958 (No. 49 of 1958)". But this defence was abandoned by them at the trial. (See page 19 of the Appeal Record). The parties simply agreed between themselves to submit for the court's ruling certain agreed issues without calling evidence. At the risk of repetition counsel for the second defendants defined the issues to be as follows:

"The issues to be decided by this Honourable Court are as follows:

(a) whether the policy of the first defendants or the second defendants were on risk at the material time of the accident;

"(b) whichever defendants are found to be liable to satisfy the judgment sum and costs, could they call for contribution from the other for 50 percent in view of the Condtion 7 of the policy of insurance."

Thus we cannot see how the second defendants should be allowed to raise this question again after having abandoned it.

In conclusion, we hold that the plaintiffs' right to the satisfaction of their judgment is not affected by any of the provisions of section 80 of the Ordinance. We therefore allow the appeal which means that the second defendants must satisfy the plaintiffs' judgment. As to the question of costs, the second defendants must bear the costs of the plaintiffs and the first defendants in the court below and here. The deposit should be refunded to the first defendants, who have won this appeal.

Appeal allowed.

Solicitors: *Devadas & Co.; K.C. Koh & Co.; Leong Wai Yin & Co.*

TAN KIAW v. GAN CHYE KHOON

[F.C. (Salleh Abas C.J., Wan Suleiman & George Seah F.JJ.) March 5 & April 21, 1983]

[Johor Bahru – Federal Court Civil Appeal No. 48 of 1982]

Landlord and tenant – Tenancy of premises in the name of partners of business – Expiry of tenancy agreement – Notice to quit given to the original partners – One of partners retired from firm – Partnership carried on by remaining partner and new partner – Judgment for possession given against tenants – Application for writ of possession – Claim by occupant of premises – Subordinate Court Rules, 1980, Order 8, rule 10, Order 30 and 31 – National Land Code, s. 225.

Partnership – Tenancy of premises in name of partners – Expiry of tenancy agreement – Notice to Quit to original partners – Retirement of one of partners.

In this case the appellant on March 12, 1977 entered into a tenancy agreement of premises belonging to her with two named persons, Taplil bin Ithnain and Lim Ah Lek, who carried on a rubber dealers business in partnership under the style of Hwa Mah Trading Company. The respondent subsequently joined the partnership. Lim Ah Lek withdraw from the firm on December 15, 1977 and the business was carried on in the name of the respondent and Taplil bin Ithnain. The tenancy agreement expired on February 28, 1980 and notice to quit was given by the appellant to Taplil bin Ithnain and Lim Ah Lek. Subsequently the appellant brought an action in the

Magistrate's Court for possession of the premises and obtained judgment against Lim Ah Lek and Taplil bin Ithnain. The appellant subsequently obtained a writ of possession in respect of the premises. The respondent applied to the High Court claiming a declaration that he was the tenant of the premises and damages for wrongful eviction and an injunction. The learned Judicial Commissioner gave judgment in favour of the respondent and the appellant appealed.

Held: (1) in this case the tenancy of the premises was granted to Lim Ah Lek and Taplil bin Ithnain and not to the partnership business and there was evidence that the appellant would not accept the respondent as a tenant of the premises. In the light of this, the finding of the learned Judicial Commission that the appellant was estopped from denying the respondent's tenancy or that the respondent was the tenant of the premises could not be supported;

(2) the provisions of section 225(2) of the National Land Code has no application to the facts of this case since the tenancy agreement in this case was for a period of three years only and the tenancy was not a registered lease or tenancy in excess of three years to which the subsection applies;

(3) the respondent in this case had notice of the proceedings and could have taken steps to apply to be included as a party to the action and as he did not do so, it was too late to object to the application of the appellant for possession.

Case referred to:

(1) *Alagappa Chettiar* v. *Coliseum Cafe* [1962] M.L.J. 111.

FEDERAL COURT.

C.C. Aiyathurai for the appellant.
K.S. Dass for the respondent.

Cur. Adv. Vult.

Seah F.J. (delivering Judgment of the Court): In the Magistrate's Court at Segamat, Johor on January 14, 1981, the present appellant, Tan Kiaw (f) obtained an order for possession of shop premises known as No. 4, Taman Jementah, Segamat, Johor against (1) Lim Ah Lek and (2) Taplil bin Ithnain together with mesne profits at the rate of $240.00 per month from March 1, 1980 till possession is delivered up to the appellant, and costs fixed at $504.00. Since no appeal was lodged after the expiration of the appeal period, application was granted to the appellant to issue a Writ of Possession. The Writ was executed on August 12, 1981 by the Court Bailiff and the present respondent, Gan Chye Khoon, who was occupying the shop premises at the material times, was evicted therefrom.

2. On September 2, 1981 the present respondent (plaintiff in the court below) took out a Writ of Summons in the High Court at Muar, Johor against the present appellant (defendant in the court below) claiming for the following reliefs:—

(a) A declaration that the plaintiff was and is still a tenant of the premises No. 4, Taman Jementah, Segamat, Johor.

(b) Damages for wrongful eviction from premises No. 4, Taman Jementah, Segamat, Johor.

(c) An interim injunction to restrain the defendant whether by herself and/or by her agent or servant from entering into possession, occupying or remaining thereof, leasing or subletting, the premises No. 4, Taman Jementah, Segamat, Johor and/or interfering with the quiet enjoyment of the plaintiff's tenancy.

(d) That all proceedings in Segamat Magistrate's Court be stayed pending the disposal of this suit.

(e) Costs.

(f) Such further or other relief as the nature of the case may require.

And the undermentioned order was made by the learned Judicial Commissioner on February 18, 1982:—

"... It is ordered that the plaintiff was and is the tenant of the premises No. 4, Taman Jementah, Segamat, Johor and the plaintiff be restored to possession of the said premises No. 4, Taman Jementah, Segamat, Johor and that the defendant whether by herself and/or her agent or servant be restrained from entering into possession, occupying or remaining thereof, leasing, subletting the said premises No. 4, Taman Jementah, Segamat, Johor and/or interfering with the quiet enjoyment of the plaintiff's tenancy AND IT IS ALSO ORDERED that the damages suffered by the plaintiff for wrongful eviction from the premises No. 4, Taman Jementah, Segamat, Johor be assessed by the Senior Assistant Registrar of the High Court, Muar, Johor AND IT IS FURTHER ORDERED that the defendant do pay the plaintiff the taxed costs of this action AND IT IS LASTLY ORDERED that upon the plaintiff entering into possession of the premises No. 4 Taman Jementah, Segamat, Johor he shall pay to the defendant the sum of $3,720.00 on or before February 28, 1982 and a further sum of $3,000.00 to be paid into High Court, Muar, Johor on or before March 30, 1982 and the monthly rental of $140.00 to be paid to the defendant with a further sum of $140.00 to be paid monthly into the High Court, Muar, Johor pending the disposal of the appeal to the Federal Court to be filed by the defendant."

At the hearing of the suit at Muar High Court, the following statement of facts were admitted by the parties, viz:—

(i) Tan Kiaw (hereinafter referred to the defen-

dant herein) is the owner and landlady of premises known as No. 4, Taman Jementah, Segamat, Johor (hereinafter referred to as the said premises).

(ii) On March 12, 1977, Tan Kiaw (the defendant herein) entered into a tenancy agreement with Taplil bin Ithnain and Lim Ah Lek in respect of the said premises.

(iii) Later in the same year 1977 between July and October, a rubber dealer's business under the name and style of Hwa Mah Rubber Trading carried on business at the said premises.

(iv) The rubber dealer's licence to carry on business at the said premises vide Licence No. A/10/5923/77 was issued in the names of Taplil bin Ithnain and Lim Ah Lek.

(v) The Business Registration of the firm trading under the name and style of Hwa Mah Rubber Trading had the following partners as from January 1, 1977; Gan Chye Khoon, Lim Ah Lek and Taplil bin Ithnain.

(vi) By the Business Registration of Hwa Mah Rubber Trading, the said firm changed its place of business to the said premises on October 4, 1977.

(vii) (a) Lim Ah Lek withdrew from the said firm on December 15, 1977.

(b) The licence to do business as rubber dealers was later issued in the name of Gan Chye Khoon (the plaintiff herein) and Taplil bin Ithnain and the renewed licence for the year 1978 was Licence No. A/01/1415/78. The original licence number issued to Lim Ah Lek and Taplil bin Ithnain is also recorded in the renewed licence.

(viii) All rents paid to the defendant herein were when acknowledged, were acknowledged on the vouchers bearing the name Hwa Mah Rubber Trading.

(ix) The tenancy agreement dated March 12, 1977 between the defendant herein and Taplil bin Ithnain and Lim Ah Lek expired on February 28, 1980. Taplil bin Ithnain and Lim Ah Lek were given a notice to quit by letter dated March 3, 1980.

(x) There was no other response from Taplil bin Ithnain or Lim Ah Lek to the defendant herein to the Notice to Quit.

(xi) Hwa Mah Rubber Trading still carried on business at the said premises after expiry of the Notice to Quit.

(xii) (a) The defendant herein issued a summons vide Civil Action No. 101 of 1980 against Taplil bin Ithnain and Lim Ah Lek on April 20, 1980 for vacant possession of the said premises.

(b) The summons was served on Lim Ah Lek on June 8, 1980 and Taplil bin Ithnain as second defendant on July 1, 1980.

(c) The Civil Action came up for hearing on November 19, 1980 and judgment was delivered on May 14, 1981 in favour of the defendant herein as plaintiff.

(xiii)(a) Lim Ah Lek and Taplil bin Ithnain applied for a stay of execution for purpose of appeal. No appeal was lodged.

(b) After the maximum period of stay had lapsed a Writ of Possession was applied for and issued by the Segamat Magistrate's Court.

(c) The Bailiff attended to the Order of Court by entering the premises in dispute and causing the defendant herein to have possession of the premises on August 12, 1981.

(d) The defendant herein pad-locked the said premises and handed the keys over to the police at their request.

The present appellant was dissatisfied with the decision of the learned Judicial Commissioner and has appealed to this court.

It was the contention of learned counsel for the appellant that the learned Judicial Commissioner decided the case not in accordance with the pleadings.

For the respondent it was submitted that the respondent's case in the court below was set out in paragraphs 4 and 7 of the Statement of Claim. Para. 4 reads:–

"The defendant (appellant herein) commenced an action in Segamat Magistrate's Court vide Segamat Magistrate's Court Civil Action No. 101 of 1980 for the recovery of the possession of the said premises naming Lim Ah Lek and Taplil bin Ithnain as defendants although the defendant well knew that the plaintiff (respondent herein) was in actual possession and has been paying rent in respect of the said premises and the defendant has been receiving rent from the plaintiff."

And para 7 reads:–

"Further and in the alternative, the defendant knew at all material times that the plaintiff was the sole person responsible for the running of the business of Syarikat Hwa Mah Rubber Trading and any tenancy agreement the defendant reached with the said Lim Ah Lek and Taplil bin Ithnain was superseded by an oral agreement between the plaintiff and the defendant whereby the defendant accepted the plaintiff as the tenant and accepted rent from the plaintiff as and when the rent fell due."

At the hearing of this appeal learned counsel for the respondent conceded (rightly in our view) that (a) the tenancy of the premises was not granted to Syarikat Hwa Mah Rubber Trading and (b) that the appellant had not accepted the respondent as a tenant of the said premises. In fact, no evidence was adduced by the respondent in the court below to support his case as pleaded in paragraphs 4 and 7 of the Statement of Claim. On the other hand, there was ample evidence from both the appellant and the respondent that the former would never accept the respondent as a tenant of the premises (see pages 65, 68, 71, 72 and 73 of the record). In this respect, the present appeal can be distinguished from the case of *Alagappa Chettiar* v. *Coliseum Cafe*[1], where the Court of Appeal agreed with the finding of the learned trial judge that it was a letting by the previous landowner to the persons who for the time being were partners carrying on business under the name and style of Coliseum Cafe and Hotel and that no reliance was placed by the landowner on any particular member of the firm. In short, the landowner did not rely on the personnel of the partners in the firm. Whereas here, the appellant, as landowner relied on the identity of Lim Ah Lek in particular when she entered into the tenancy agreement with Lim Ah Lek and Taplil bin Ithnain on March 12, 1977. The appellant made it abundantly clear that she would not accept the respondent as a tenant or one of the tenants and the respondent knew of this as a fact. In the light of this, in our judgment, the finding of the learned Judicial Commissioner that the appellant was estopped from denying the respondent's tenancy or that the respondent was her tenant of the premises at No. 4, Taman Jementah, Segamat, Johor could not be supported.

Next, learned counsel for the respondent relied on the provision of section 225(2) of the National Land Code 1965 for the proposition that when Lim Ah Lek and Taplil bin Ithnain entered into the said tenancy agreement with the appellant on March 12, 1977 they must be presumed to have done so as trustees or representatives of the respondent. Section 225 reads:–

"225(1) The powers conferred by this Chapter shall be exercisable in any particular case subject to –

(a) any prohibition or limitation imposed by this Act or any other written law for the time being in force;

(b) any restriction in interest to which the land in question is for the time being subject; and

(c) so far as they are conferred on lessees, sub-lessees and tenants, the provisions, express or implied, of the lease sub-lease or tenancy in question.

(2) Without prejudice to paragraph (a) of sub-section (1), no lease or tenancy may be granted to two or more persons or bodies otherwise than as trustees or representatives."

According to section 5 of the National Land Code 1965 "lease" means "a registered lease or sub-lease of alienated land". There is, however, no definition of "tenancy" in section 5 but "tenancy exempt from registration" has the meaning assigned thereto by sub-section (1) of section 213.

Section 213(1) provides that "In this Act "tenancy exempt from registration" means –

(a) any tenancy or sub-tenancy for a term not exceeding three years granted pursuant to section 223; and

(b) any tenancy or sub-tenancy for a term not exceeding one year granted pursuant to the provisions of any previous land law."

It seems to follow that the words "lease" or "tenancy" in sub-section (2) of section 225 means "a registered lease" or "a tenancy in excess of three years". Since the tenancy agreement dated March 12, 1977 entered into between the appellant of the one part and Lim Ah Lek and Taplil bin Ithnain of the other part was for a period of three years only commencing from March 1, 1977 to February 28, 1980 we are of the opinion that the provision of section 225(2) of the National Land Code 1965 has no application to the facts of this case. The submission of learned counsel for the respondent based on sub-section (2) of section 225 therefore fails.

Having regard to these findings, the learned Judicial Commissioner erred in law in holding that the respondent was and still is a tenant of the appellant in respect of premises at No. 4, Taman Jementah, Segamat, Johor, and that the appellant was esfopped from denying the respondent's tenancy of the said premises.

Learned counsel for the respondent argued that the appellant should serve the respondent

with a notice to quit and should also make the respondent a party to the proceedings when action was taken for vacant possession of the shop premises at the Magistrate's Court at Segamat, Johor. We do not know on what legal basis the learned counsel was making this submission and no authority was cited to support it. On the facts of this appeal, we are of the opinion that notice to quit need only be served on the parties to the tenancy agreement, viz. Lim Ah Lek and Taplil bin Ithnain, for the appellant had never accepted or recognised the respondent as a tenant. The respondent was regarded by the appellant as a manager of Hwa Mah Rubber Trading which firm was allowed to carry on business in the said premises by the tenants, Lim Ah Lek and Taplil bin Ithnain, who were also co-partners in Hwa Mah Rubber Trading, during the term of the tenancy. It follows that the firm had no interest and did not acquire any interest in the premises known as No. 4, Taman Jementah, Segamat, Johor. However, Order 8 rule 10 of the Subordinate Court Rules 1980 may be relevant and it reads as follows:—

10(1) Without prejudice to rule 6 and subject to the provisions of sections 70 and 71 of the Act the Court may at any stage of the proceedings in an action for possession of immovable property order any person not a party to the action who is in possession of the immovable property (whether in actual possession or by a tenant) to be added as a defendant.

(2) An application by any person for an order under paragraph (1) must be made by notice stating the grounds of the application and supported by affidavit showing that he is in possession of the immovable property in question and if by a tenant, naming him.

(3) The application must be served on the plaintiff and every defendant.

(4) .....

According to the record the respondent was cross-examined about the proceedings in the Segamat Magistrate's Court and he replied that not only he had notice and knowledge of them but was present in court during part of the hearing. If he claimed any interest in the premises at No. 4, Taman Jementah, Segamat, Johor he ought to have taken reasonable steps by applying to the court to be included as a party to the action in addition to the named defendants, viz. Lim Ah Lek and Taplil bin Ithnain, under Order 8 rule 10 of the Subordinate Court Rules 1980. He did nothing ofthe kind but sat back to wait for the outcome of the court action. Learned counsel for the respondent stated from the Bar that when the appellant applied to the learned Magistrate for leave to issue a Writ of Possession pursuant to Order 30 rule 3 and Order 31 rule 4 thereof the respondent attempted to intervene at this stage of the proceedings but the learned Magistrate disallowed him from doing so on the grounds, *inter alia*, that the respondent had received notice of the proceedings as appeared to the trial court sufficient to enable him to apply to the court for any relief which he may be entitled (see Order 30 rule 3(3)), and it was too late in the day to object to the application of the appellant. In our judgment, the learned Magistrate came to the correct decision having regard to the above-mentioned facts.

For the above reasons, we set aside the judgment of the learned Judicial Commissioner and allow the appeal with costs here and below to be taxed. The $500.00 deposit to be returned to the appellant.

Appeal allowed.

Solicitors: *C.C. Aiyathurai & Co.; Wong & Dass.*

LAI CHENG CHEONG v. SOWARATNAM

[F.C. (Wan Suleiman, Seah and Mohamed Azmi F.JJ.) January 8 & April 30, 1983] [Kuala Lumpur — Federal Court Civil Appeal No. 194 of 1982]

Administrative Law — Application for order of certiorari — Decision of Labour Officer — Whether necessary that right of appeal be exhausted — Employment Ordinance, 1955, S. 77 — Rules of the High Court, 1980, Order 55.

In this case the appellant applied for leave to apply for an order of certiorari to quash the decision of a Labour Officer on the grounds (a) that the proceedings at which the decision was made were and appeared to be conducted in a manner contrary to natural justice and (b) that the Labour Officer was biased. The application was opposed on the ground that the appellant had not exhausted his right of appeal to the High Court. The learned trial judge refused the application and the appellant appealed.

Held, an applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierachy nor need he have exhausted his right of appeal to a court of law. The appeal should therefore be allowed and the application for leave granted.

Cases referred to:

(1) *Metal Industry Employees Union* v. *Registrar of Trade Unions Ors.* [1976] 1 M.L.J. 220.